STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Borrello, P.J., Whitbeck, and K.F. Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v.

Supreme Court No.: 140371
Court of Appeals No.: 286479
Circuit Court No.: 07-004128-FH

DAVID RAY SMITH,

Defendant/Appellee.
_____/

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AMICUS CURIAE BRIEF OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN IN SUPPORT OF DEFENDANT/APPELLEE

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STATEMENT OF JURISDICTION

The Criminal Defense Attorneys of Michigan and the State Appellate Defender Office accept that this Honorable Court has jurisdiction over this matter.

STATEMENT OF QUESTIONS PRESENTED

I. **OFFENSE VARIABLE 19 DOES NOT ALLOW CONSIDERATION OF POST-OFFENSE CONDUCT?**

Amicus Curiae answers, "Yes".

STATEMENT OF INTEREST OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2.

CDAM was invited to file an amicus brief in this matter. *People v Smith,* 485 Mich 1133; 780 NW2d 293 (2010).

STATEMENT OF FACTS

Amicus-CDAM relies on the statement of facts provided by the parties. It would appear the scoring of fifteen points under Offense Variable 19 (OV 19) resulted in a sentencing guidelines range of 50 to 125 months, and the sentence will represent a departure if OV 19 is scored at zero points (the correct range would be 43 to 107 months). The trial court imposed a minimum term of ten years imprisonment for the manslaughter conviction. *See People v Kimble,* 470 Mich 305; 684 NW2d 669 (2004) (allowing review of scoring errors with or without objection if the sentence will constitute a departure).

I. OFFENSE VARIABLE 19 DOES NOT ALLOW CONSIDERATION OF POST-OFFENSE CONDUCT.

This Court concluded in *People v McGraw,* 484 Mich 120; 771 NW2d 655 (2009), that the default rule for scoring the offense variables must be an "offense specific" approach because some offense variables allow consideration of post-offense conduct while others do not. In particular, Offense Variable 14 (leader of a multiple offender situation) contains the instruction that the "entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). In light of this language, and considering similar language in some but not all of the offense variables, the Court rejected a transactional approach to the scoring of the offense variables unless the variable permits consideration of pre- or post-offense conduct:

> As we explained in *Sargent*, it is telling that the Legislature included language in particular variables explicitly instructing the sentencing court to consider factors or conduct beyond the sentencing offense itself; however, it included no such language in other variables, such as OV 9. If the Legislature had intended a court scoring the sentencing guidelines to use a transactional approach, much of the language in some of the offense variables would have been surplusage. * * *
>
> If we read the sentencing guidelines as offense-specific by default, the language defining the scope of conduct for particular offense variables is not surplusage. For example, points are assessed under OV 14 if the offender was a leader in a multiple-offender situation. The statute provides that the "entire criminal transaction should be considered" when scoring this offense variable. When we acknowledge that the default procedure is to score the offense variables using an offense-specific approach, the instruction for OV 14 takes on significance. * * * The Legislature's wording of the offense variable statutes implies a default rule that the variables are to be scored considering the sentencing offense alone. [484 Mich at 126-127.]

The question presented in the instant case is whether Offense Variable 19 permits the consideration of post-offense conduct. Consistent with *McGraw*, the answer is "No." Nothing in the language of Offense Variable 19 permits a court to consider post-offense conduct.

The parties have quoted the language in Offense Variable 19 for the benefit of the Court, and Amicus-CDAM will not do so, but it is important to note that there are no instructions for the scoring of Offense Variable 19. This is the one offense variable without instructions. *People v Underwood,* 278 Mich App 334, 338; 750 NW2d 612 (2008). Moreover, there is no language within the variable that directs the court to look beyond the sentencing offense.

Analyzing the language of Offense Variable 19 as a whole, it is not difficult to understand the meaning of the variable. When the Legislature created the offense variables, it meant to capture factors that are *uniformly* aggravating. *See People v Hegwood,* 465 Mich 432, 438-439; 636 NW2d 127 (2001) ("At the time it enacted these guidelines, the legislature opted for a system with many features that were easily recognized by courts familiar with the format previously employed in Michigan . . . concepts such as . . . offenses variables . . . ."); *People v Milbourn,* 435 Mich 630, 661 n. 28; 461 Mich 1 (1990) ("In selecting variables for inclusion [in the judicial sentencing guidelines], the Sentencing Guidelines Advisory Committee has sought to include variables that would be a) nonprejudicial, b) uniformly mitigating or aggravating . . . ."). It is uniformly aggravating that a crime interferes with the administration of justice or the rendering of emergency services.[1] Whatever the nature of the crime, if the underlying conduct interferes with the administration of justice or the rendering of emergency services it is a serious

[1] The prosecutor makes much of the language "rendering of emergency services," but it would appear this language was added to make clear that the rendering of emergency services would be considered an interference with the administration of justice (even if services were provided by a private company).

offense, and one rightly classified as an aggravated crime under the legislative sentencing guidelines.

Any concern that a narrow application of OV 19 – an application that captures only conduct occurring *during* the sentencing offense - will thwart the interests of justice is misplaced. OV 19 was designed to pick up conduct that renders the offense an aggravated offense, i.e. conduct that not only violates some underlying law but also impedes the administration of justice or otherwise the rendering of emergency aid. In this sense, the Legislature has attempted to capture two forms of conduct: 1) conduct that occurs during the offense, but does not constitute the underlying crime itself, and 2) conduct that constitutes the underlying offense and, by its nature, interferes with the administration of justice. To the extent that this latter category constitutes a form of "double counting" (as the defendant is punished for the underlying conduct and additionally receives points under the sentencing guidelines for the exact same conduct), the Legislature is permitted do this. *See e.g.,* MCL 777.33(2)(c) (50 points proper under Offense Variable 3 for a drunk driving causing death although death is an element of the crime); MCL 777.45(1)(g) (five points under Offense Variable 15 if offense involves delivery of possession with intent to deliver a controlled substance).

Concern that there will be instances where conduct occurs moments after the offense is completed – a threat to kill the victim, for example – and this conduct will not be considered by the sentencing guidelines is likewise misplaced. Offense Variable 12 captures conduct that occurs within 24 hours of the offense and will not result in a separate criminal conviction. MCL 777.42. Offense Variable 12 was designed to capture transactional conduct that does not constitute the sentencing offense. To the extent that this variable limits itself to felonious conduct, the Legislature is permitted to make the choice and it is not an unreasonable one (as not

all transactional conduct should necessarily elevate the recommended range of the sentencing guidelines).

Should the sentencing court face a situation where post-offense conduct occurs more than 24 hours after the sentencing offense, and interferes with the administration of justice, the court has two methods for considering this conduct. First, the defendant's post-offense conduct may influence the court's choice of where within the sentencing guidelines range the sentence should fall. Second, if the conduct is particularly serious, the court may choose to depart from the recommended range if the court can articulate substantial and compelling reasons to do so.

From the prosecutor's perspective, if the prosecutor feels strongly that the sentencing court should consider post-offense conduct, and should OV 12 not apply or should the prosecutor feel the variable does not sufficiently consider the severity of the conduct, the prosecutor has two options. It may argue for a departure on the ground that OV 12 does not give sufficient weight to the conduct (or does not consider it at all). *See* MCL 769.34(3)(b) (standard for departing based on offense or offender characteristic already accounted for within the scoring of the guidelines). Or it may separately charge and seek conviction for the post-offense conduct. An offender convicted of post-offense conduct that is felonious, notably, will receive additional points under Prior Record Variable 7 for one or more contemporaneous or subsequent felony convictions. MCL 777.57. This was the case for Mr. Smith who was convicted of both manslaughter and witness intimidation (and the misdemeanor offense of reckless driving), and received ten points for the witness intimidation conviction under PRV 7.

In addition to the multiple ways in which the sentencing guidelines consider post-offense conduct, the Legislature has offered one additional penalty for post-offense conduct that interferes with the administration of justice. Many of the offenses that would be considered an

interference with the administration of justice carry the possibility of discretionary and sometimes mandatory consecutive sentencing. *See* MCL 750.122(11) (witness intimidation, sentence may be consecutive to sentence for any other crime including ones committed during same transaction); MCL 750.120a(6) (juror intimidation – same); MCL 750.483a(10) (obstructing criminal investigation, sentence may be consecutive to sentence imposed for any other crime including a violation arising out of the same transaction); MCL 750.119(3) (bribery of witness, sentence may be consecutive to sentence imposed for any other crime including a violation arising out of the same transaction);MCL 750.81d(6) (resisting or assaulting officer, sentence may be consecutive to any sentence imposed for a violation arising from the same transaction); MCL 768.7a(1) (mandatory consecutive sentencing for crimes committed while incarcerated or while on escape status and escape crimes as well); MCL 768.7b (discretionary consecutive sentencing for commission of felony pending disposition of felony charge – which would necessarily include absconding while on bond under MCL 750.199a).[2]

Applying this Court's decision in *McGraw* to the instant matter will not cause the Court to overrule its earlier decision in *People v Barbee,* 470 Mich 283; 681 NW2d 348 (2004). In the *Barbee* decision, Justice Cavanaugh, writing for a unanimous court, concluded that providing a false name to an officer at the time of arrest constitutes an interference with the administration of justice. The question posed on appeal in *Barbee* was whether pre-charge, pre-arrest conduct could constitute an interference with the administration of justice. The question was <u>not</u> whether post-offense conduct could be scored under OV 19. The Court did not address whether OV 19 was designed to consider post-offense conduct. To the contrary, the Court concluded that

[2] Because the offense of witness intimidation carries the possibility of discretionary consecutive sentencing, the probation department should have scored a separate Sentencing Information Report for this crime. MCL 771.14(2)(e)(i). Amicus-CDAM agrees OV 19 could have been scored for the witness intimidation conduct if the guidelines had been scored for this conviction.

providing a false name to the police officer constitutes an interference with the administration of justice and "OV 19 may be scored, when applicable, for this conduct." 470 Mich at 288. The Court repeated, "OV 19 may be scored for this conduct *where applicable*." *Id.* (emphasis added).

To the extent that *Barbee* itself involved post-offense conduct (Amicus-CDAM agrees with the prosecutor that the conduct in *Barbee* occurred after the drunk driving was completed), again, the Court was not called upon to address the larger question of whether OV 19 considers post-offense conduct. Amicus would note that *Barbee* pre-dates the *McGraw* decision by five years, and *Barbee* was one of the first scoring decisions of this Court. Only with the passage of time, and through continued use and study of the legislative sentencing guidelines, have Michigan courts begun to appreciate the intent of the Legislature and the inherent limits of the scoring of the offense variables.[3]

Amicus-CDAM would respond as well to two concerns voiced by Amicus-PAAM in this case. First, *McGraw* does not require an "elements only" approach to the scoring of the offense variables. There is nothing within the sentencing guidelines scheme as a whole that instructs the court to disregard the actual facts when scoring the underlying facts of the sentencing offense. To the contrary, sentencing courts routinely assess points for the use of a gun under OV 1 and OV 2 when sentencing an offender for unarmed robbery (if a gun was, in fact, used). Likewise, penetration is scored under OV 11 when the sentencing offense is not first- or third-degree criminal sexual conduct. MCL 777.41. But should this Court wish to consider an elements-only approach, the question is best left for another day.

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[3] This Court attempted to delineate the scope of conduct considered by the offense variables in *People v Morson,* 471 Mich 248 685 NW2d 203 (2004), but the Court could not reach consensus and thus choose to avoid the question. *See McGraw*, at 129 fn. 28.

Finally, Amicus-PAAM has argued that MCL 769.31 is not a definitional statute and applies to the scoring of the offense variables. The short answer to this allegation is that witness intimidation is not a Proposal B offense under MCL 791.233b, and thus MCL 769.31(d) cannot possibly apply. The more complete answer is the answer provided by Mr. McGraw in his brief on appeal, repeated in its entirety here at footnote 4.[4]

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[4] In various opinions, members of this Court have suggested without holding that MCL 769.31 expands the scope of the conduct to be considered when scoring the offense variables. *Morson, supra* at 273-274 (Markman, J., concurring and dissenting); *Morson, supra* at 278-279 (Young, J., dissenting).

The *Sargent* Court also made reference to the provisions of MCL 769.31(d) in reaching the conclusion that the offense variables consider conduct "relating to" the sentencing offense:

> The appropriate minimum sentence range is determined in part by scoring the offense variables. From this context, it seems clear that the term "offense characteristics" [in MCL 769.31(d)] includes the characteristics that are taken into consideration under the offense variables. Therefore, if anything, MCL 769.31(d) suggests that, generally, only conduct "relating to the offense" may be taken into consideration when scoring the offense variables. [481 Mich at 349.]

Nevertheless, the *Sargent* Court took no firm position on whether "same transaction" conduct may be scored within the offense variables, and articulated a rule with hesitation attached to it: "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or at most, during the same criminal transaction) should be considered." 481 Mich at 350.

The scoring of the offense variables is not controlled by MCL 769.31. This statute does not broaden the scope of the conduct to be considered and scored within the offense variables. The provisions of MCL 769.31 do not apply to the scoring of the offense variables at all.

MCL 769.31, by its terms, applies to sections 31 and 34 only (viz., MCL 769.31 and MCL 769.34). The first sentence of the statute explains this:

> **769.31. Sentencing guidelines; definitions**
>
> Sec 31. As used in this section and sections 34 of this chapter:

In other words, the language of MCL 769.31 does not apply to any other statute except MCL 769.34.

Both MCL 769.31 and MCL 769.34 are not part of the application and scoring sections of the sentencing guidelines (i.e., the statutes addressing the classification of crimes, scoring and recommended ranges, see MCL 777.1. et seq), but rather address the broader questions of when a sentence must fall within the sentencing guidelines range and when a departure is permitted. Both MCL 769.31 and MCL 769.34, and their earlier counterparts of MCL 769.32 and MCL 769.33, represent the original four enabling/directional statutes of the statutory sentencing guidelines. These four statutes were designed to set the basic framework of the guidelines. MCL 769.31 provided the basic definitional terms for the drafting of the legislative sentencing guidelines. MCL 769.32 set forth the composition and selection of the guidelines commission. MCL 769.33 set for the duties of the guidelines commission. And MCL 769.34 directed application of the guidelines to all felony offenses and set forth the appropriate departure standard.

The definitional terms of MCL 769.31 were relevant only for these four enabling/directional statutes. The definitional terms were not meant to control the guidelines statutes as later passed by the legislature (i.e., the classification and scoring sections of MCL 771. et seq.). There is nothing within MCL 769.31 that extends its terms and definitions to the guidelines as later enacted under MCL 777.1. et seq. To the contrary, there are separate definitional sections found within the guidelines statutes themselves, beginning at MCL 777.1 et seq., and only some of these sections carry over the same definitional terms found within MCL 769.31. Compare MCL 769.31(c) ("defining intermediate sanction") and MCL 777.1(d) (defining "intermediate sanction"); MCL 769.31(b) (defining "departure") and MCL 777.1(b) (same); and MCL 769.31(f) (defining "prior criminal record") and MCL 777.50(4)(a) (defining "conviction" in a similar manner). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210 501 NW2d 76 (1993).

In addition, the legislative history of MCL 769.31 makes clear that this statute was meant to provide guidance to the Guidelines Commission, not the sentencing court. This can be seen from the changes made in the statute after the guidelines statutes were passed by the legislature. The first change to the statute was the substitution of the word "legislature" for "commission" in MCL 769.31(e) (now MCL 769.31(d)). The second change deleted the definition of the term "commission" under MCL 769.31(a). And the third change contains two aspects: the repeal of MCL 769.32 and MCL 769.33, and the corresponding removal of the reference to these two statute in the first sentence of MCL 769.31 Below is the original version of MCL 769.31, compared with the current version:

Original Version:

MCL 769.31. Definitions

Sec. 31. As used in this section and sections 32 to 34 of this chapter:

(a) "Commission' means the sentencing commission created in section 32 of this chapter.

(b) "Departure' means . . .

(c) "Intermediate sanction' means . . . .

(d) "Offender characteristics' means only the prior criminal record of an offender.

(e) "Offense characteristics' means the elements of the crime and the aggravating and mitigating factors relating to the offense that the commission determines are appropriate and consistent with the criteria described in section 33(1)(e) of this chapter. For purposes of this subdivision, an offense described in section 33b of Act No. 232 of the Public Acts of 1953, being section 791.233b of the Michigan Compiled Laws, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered an aggravating factor.

(f) 'Prior criminal record' means . . .

(g) 'Total capacity of state correctional facilities' means . . . [MCL 769.31 prior to amendment by 1998 PA 317.]

Current Version:

MCL 769.31. Definitions

Sec. 31. As used in this section and section 34 of this chapter:

(a) "Departure' means . . .

(b) "Intermediate sanction' means . . . .

(c) "Offender characteristics' means only the prior criminal record of an offender.

(d) "Offense characteristics' means the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate. For purposes of this subdivision, an offense described in section 33b of Act No. 232 of the Public Acts of 1953, 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered an aggravating factor.

(e) 'Prior criminal record' means all of the following. . . [MCL 769.31 after amendment by 1998 PA 317.]

Read together, the legislature's use of the word "commission" in the original statute, its definition of the term "commission" in that same statute, and its references to MCL 769.32 and MCL 769.33 in the original statute, reflect the legislature's intention to provide guidance and direction to the Guidelines Commission in drafting the statutory sentencing guidelines. When the guidelines were then passed in 1998, the directive nature of MCL 769.31 became unnecessary. The legislature corrected this in 2002, and at the same time abandoned the notion of a continuing guidelines commission by repealing both MCL 769.32 and MCL 769.33. 2002 PA 31. Now, MCL 769.31 is a definitional section that applies, by its own terms, to MCL 769.34 alone.

In other words, MCL 769.31 was a precursor to the final guidelines statutes and was a directive to the Commission, but it was never meant to define the terms or the proper scoring of the statutory sentencing guidelines as they are now found in MCL 777.1 *et seq*.

For all the above reasons, this Court should conclude that points may be assessed pursuant to MCL 777.49 (OV 19) for conduct that occurs during the sentencing offense only. Should there exist post-offense conduct that is felonious, occurs within 24 hours, and will not result in a separate conviction it may be scored under Offense Variable 12. If the post-offense conduct is not felonious and/or does not occur within 24 hours, it may be considered as a potential departure reason or may be used to determine where within the sentencing guidelines range a sentence should fall. Finally, the prosecutor is free to seek conviction with reference to post-offense conduct, and any concurrent felony convictions will be scored under PRV 7.

The Guidelines Commission, incidentally, did not ignore the directive of the legislature to consider the enumerated offenses of Proposal B of 1978 (MCL 791.233b) as aggravating factors to be considered within the scoring of the guidelines. The Commission took a broader approach than directed, proposing that all concurrent felony offenses be scored as an aggravating factor under Prior Record Variable 7. The legislature adopted this proposal when it passed the guidelines statutes in 1998. See MCL 777.57.
In sum, the legislature intended that all of Proposal B offenses of 1978 should be considered as aggravating factors in the scoring of the sentencing guidelines when the conduct results in a conviction arising from the same transaction as the sentencing offense. This was accomplished with the creation of PRV 7. That the legislature initially envisioned this same conduct as an aggravating offense characteristic did not preclude the legislature, in the final guidelines statutes, from moving this conduct to a prior record variable. *See* Frase, *Sentencing Guidelines in Minnesota*, 1978-2003, 32 Crime & Just. 131, 157 (noting that as a result of the decision in *State v Hernandez*, 311 NW2d 478 (Minn, 1981), the Minnesota sentencing guidelines consider concurrent criminal convictions under the offender's criminal history).

SUMMARY AND RELIEF REQUESTED

Amicus-CDAM respectfully asks this Court to affirm the decision of the Court of Appeals in this matter. The Court should also expressly overrule the decision in *People v Ericksen,* ___ Mich App ___ (Docket No. 288496, released April 15, 2010) (holding OV 19 does consider post-offense conduct).

Respectfully submitted,

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